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No. 09-946

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH JASKOLSKI, et al.,

Petitioners,

v.

RICK DANIELS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Daniels' Brief in Opposition ("Opp.") only serves to underscore the need for this Court's review. Even the Daniels do not attempt to defend the Indiana Court of Appeals' unacceptable notion that the government had no authority to control Petitioner Joseph Jaskolski while he assisted FBI Agent Campbell and AUSA Butler in interrogating federal grand jury witnesses or handling federal grand jury materials because Jaskolski was purportedly acting as an "independent contractor" rather than an "employee of the government" under 28 U.S.C. §2671. The very idea that there could be rogue "independent" contractors investigating and prosecuting *federal crimes*, acting independently and entirely free of any detailed control by the federal government, is absurd.

And the Daniels do not dispute that the only reason the Indiana Court of Appeals' reached such an untenable conclusion is because it wrongly superimposed on top of the burden of proof set forth in *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976) the additional requirement that Jaskolski prove the government "pressed him into service" and had the authority to "require" or coerce Jaskolski into doing things at their will. And even the Daniels do not attempt to defend the Indiana Court of Appeals' resulting conclusion that the undisputed evidence FBI Agent Campbell and AUSA Butler physically supervised and directed Jaskolski at every moment and as to every detail and that Jaskolski agreed to obey such

directions was not enough to prove Jaskolski was an "employee of the government" under §2671, *Logue* and *Orleans*.

The Daniels duck these issues entirely because they cannot possibly defend them. The Indiana Court of Appeals' superimposition of a new and unprecedented burden of proving the government shanghaied or "pressed [Jaskolski] into service" and could "require" or coerce him to act against his will is in direct conflict not only with *Logue* and *Orleans* and §2671 itself – which by its terms unambiguously includes volunteers – but also with our essential values of liberty and freedom that no person is another's slave.

Instead, the Daniels repeat here several false or unfounded contentions that even the Indiana Court of Appeals ignored. Indeed, because the Indiana Court of Appeals' central premise that Jaskolski had to prove an element of coercion could not be met by any facts, all of the Daniels' factual contentions are entirely irrelevant.

The Daniels first essentially acknowledge that the Indiana Court of Appeals applied the wrong test. While the Indiana Court of Appeals required proof of coercion, the Daniels correctly state that the correct test does not consider any element of coercion but rather only requires that the government had the authority to "physically supervise" Jaskolski's day-to-day activities. (Opp. at 8.)

But the Daniels attempt to avoid the inevitable conclusion that Jaskolski acted as an "employee of the government" by asserting that there was no federal statute *requiring* Jaskolski to follow the orders of the government. The Daniels suggest that *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1932) requires the existence of such a statute before the government, as an employer, has the authority to control a volunteer such as Jaskolski.

But the Daniels' interpretation of *Denton* is not well taken. Neither *Denton* nor any other authority suggests that the right of an employer to control an employee must first be created by statute. To the contrary, as established in Jaskolski's Petition, such authority is established by the agreement of the parties.

Furthermore, the circumstances of this case establish even more strongly than those in *Denton* that the government had the authority to control. Under the statute involved in *Denton*, the government delegated certain tasks regarding the handling of mail to various railroads. The statute in *Denton* allowed the government to retain control over the details of the work by requiring the railroads to perform those tasks at the direction of a government employee.

In this case, however, no statute ever delegated to non-governmental actors the task of investigating or prosecuting federal crimes to begin with. To the contrary, pursuant to the United States Constitution and federal statute, the government always retained

exclusive control over the investigation and prosecution of federal crimes. U.S. Const., Art. II, Sec. 3; 28 U.S.C. §§507, 531, 533; *Smith v. United States*, 375 F.2d 243, 246-47 (5th Cir. 1967). Therefore, there was never any need for yet another statute to allow the government to exercise control over the investigation and prosecution of federal crimes. The authority of the government to control anyone they allowed to participate in such activities was always necessarily present and inherent in the activity itself.

The Daniels next attempt to impose an unprecedented rule of their own. According to the Daniels, Jaskolski had to present "objective" rather than "subjective" evidence. (Opp. at 9-10, 14.) The Daniels' contention is irrelevant because the Indiana Court of Appeals did not rely on, or even mention, any distinction between "subjective" or "objective" evidence. Furthermore, the cases cited by the Daniels do not mention any distinction between "subjective" and "objective" evidence.

In any event, Jaskolski presented ample evidence to "objectively" establish that the government controlled Jaskolski's actions. It is undisputed Jaskolski and the government agreed on April 1, 1999 that Jaskolski was subject to the Rule 6(e) Certification while he worked specifically on the Daniels case. (App. 142-43.) (Accordingly, that he signed the Rule 6(e) Certification earlier is irrelevant.) Consequently, if Jaskolski acted contrary to the government's directives, such as by attempting to disclose any grand

jury material, then he would be subject to criminal contempt. (App. 143; App. 162-64.)

Furthermore, Jaskolski did not testify to his "subjective" opinions or conclusions. He testified in great detail as to objective facts, including the statements made and the physical actions taken by FBI Agent Campbell and AUSA Butler, establishing the government had the authority to control his activities in the Daniels case. As just one of many examples established in the record, Jaskolski testified that FBI Agent Campbell and AUSA Butler told him which witnesses were to be interviewed, when and where they were to be interviewed, how they were to be interviewed, and what facts from those interviews were to be used. That FBI Agent Campbell and AUSA Butler always told Jaskolski what to do in every detail and that Jaskolski followed those instructions were not mere "subjective" facts existing only in Jaskolski's mind: they were objective manifestations of the agreement between Jaskolski, FBI Agent Campbell and AUSA Butler that the government had the authority to control the details of Jaskolski's work.

The Daniels' assertions that Jaskolski also did work on other cases for NICB and that he was paid by NICB are likewise irrelevant. The Indiana Court of Appeals itself necessarily recognized that, even though Jaskolski remained an employee of NICB, he still would be a borrowed "employee of the government" with respect to his activities on the Daniels case if the federal government had the authority to control those activities. (App. 29-30.) See also *Logue*

v. United States, 412 U.S. 521, 531 (1973) ("employee of the government" includes employees loaned by non-governmental employer to the government); *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U.S. 28 (1928) ("employee" includes borrowed employee); *Ezekiel v. Michel*, 66 F.3d 894, 903 n.16 (7th Cir. 1995) (that defendant was not paid by the government "of no moment" to whether he was "employee of the government"); Restatement (Second) of Agency §227, comment d.

Similarly, the Daniels' reliance on the Indiana Court of Appeals' discussion of the ten factors under Section 220 of the Restatement (Second) of Agency is misplaced. This Court and every other court has consistently recognized that the employer's authority to control the details of the work is the single most critical factor in applying the definition of "employee of the government" under §2671. See, *e.g.*, *Logue*, 412 U.S. at 526-28. The Indiana Court of Appeals itself likewise acknowledged that its analysis of Section 220's other nine factors necessarily hinged entirely on its foundational conclusion that Jaskolski had not proved the government had "pressed him into service" or could "require" or coerce him to act according to its will and thus had failed to establish the primary factor of control. For example, in analyzing one of the ten factors, the Indiana Court of Appeals conceded that "the federal prosecution of a purported criminal is 'the kind of occupation' one would expect to occur 'under the direction of the employer'" – that is, the

government. (App. 37.) The court nonetheless concluded that this factor did not weigh in favor of Jaskolski solely because the government did not "require" or coerce Jaskolski to act and thus Jaskolski purportedly had not demonstrated the primary factor that the government directed his actions. (*Id.*)

Finally, the Daniels unnecessarily engage in a series of misrepresentations regarding the facts. As demonstrated above, the Indiana Court of Appeals' opinion essentially renders any and all facts irrelevant to the definition of "employee of the government" under §2671 by imposing an impossible burden of proving coercion; there are no facts which could ever demonstrate the government had the authority to "require" or coerce a volunteer such as Jaskolski to act. Nevertheless, solely in order to avoid even the possibility of any unfair prejudice to Jaskolski, this Reply Brief will present the accurate facts.

The Daniels first misstate the record by suggesting that the "work Jaskolski did in investigating or 'researching' the claim was done on behalf of the National Insurance Crime Bureau. (App. 8, 32, 51) (Resp. App. 4)." (Opp. at 2.) The pages of the appendix cited by the Daniels do not support their contention and indeed the undisputed facts establish the exact opposite. Jaskolski testified that his initial investigation started with a request from Liberty Mutual to NICB, but that after the government decided to open its own investigation on April 1, 1999, all of his work was done on behalf of and under the control of

the federal government. (App. 142-43; App. 153-54; Resp.App. 4.)

Jaskolski has always asserted he was an "employee of the government" only for those activities he undertook beginning April 1, 1999 at the government's request and pursuant to its direction and control. Therefore, all of his activities prior to April 1, 1999 are irrelevant to this appeal.

The Daniels next misleadingly suggest that "the United States Attorney General has consistently opposed Jaskolski's and NICB's petition for Westfall Act certification" "to the present." (Opp. at 3.) That is not correct.

To begin with, the United States has never disputed the essential fact that it physically supervised every detail of Jaskolski's involvement in the investigation and prosecution of Rick Daniels. To the contrary, the United States *admitted* Jaskolski always acted under the direction of either FBI Agent Campbell or AUSA Butler and that it treated Jaskolski as "government personnel." (App. 166.)

Instead, the United States only took the untenable legal position – and even then only in the federal district court – that these undisputed facts were not enough to establish Jaskolski was an "employee of the government" only because FBI Agent Campbell and AUSA Butler did not have the authority to coerce Jaskolski to act against his will. After the federal district court's decision, the United States has never again asserted such a legal argument and indeed has

not filed in either the Indiana state courts or this Court any brief substantively opposing Jaskolski's attempt to be certified as an "employee of the government." Whether such silence represents an abandonment of its earlier position combined with a perhaps understandable reluctance to change the status quo and accept liability for its control over Jaskolski is unclear, but at the very least the Court should ask the United States to state its position before ruling on this Petition.

The Daniels also falsely assert that Jaskolski did not seek certification as an "employee of the government" until "five years" after they filed the underlying lawsuit. (Opp. at 4.) There is no relevance to such an assertion but it is false in any event. Jaskolski sought certification shortly after the Daniels sued him, and there was no need to seek such certification prior to being sued. (App. 94.) The Attorney General took almost two years to consider Jaskolski's request and Jaskolski filed his Westfall Petition in the Indiana state court within two months of the Attorney General's decision. (App. 80.)

Lastly, the Daniels falsely allege that Jaskolski did not have any "evidence" that Rick Daniels was involved in the arson of his brother's vehicle when he took the results of his investigation to FBI Agent Campbell. (Opp. at 2.) The pages of their appendix cited by the Daniels do not support such a proposition. As such a misrepresentation is irrelevant in any event, no purpose would be served by adding here the pages of the record on appeal establishing the truth

that Jaskolski presented ample evidence of arson to FBI Agent Campbell on April 1, 1999. Nevertheless, it is highly objectionable for the Daniels to insinuate that the United States Attorney opened a criminal investigation without having any evidence before it suggesting a crime was committed.

CONCLUSION

Wherefore, Petitioners Joseph Jaskolski and the National Insurance Crime Bureau respectfully pray that this Honorable Court grant this Petition and issue a writ of certiorari to the Indiana Court of Appeals, that this Court order the reversal of the April 24, 2009 decision of the Indiana Court of Appeals, and enter in lieu thereof a judgment certifying that Jaskolski was an "employee of the government" under 28 U.S.C. §2671 with regard to all of his activities related to the Daniels case beginning April 1, 1999, and ordering the substitution of the United States as a party defendant in place of Jaskolski for all

allegations regarding Jaskolski's activities after April 1, 1999, and granting such other relief as this Court deems just.

Respectfully submitted,

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